United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2116

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2116

B

EDWARD C. KIRKLAND and NATHANIEL HAYES,
each individually and on behalf of
all others similarly situated,

Plaintiffs-Appellees,

-against-

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al.

Defendants-Appellants

-and-

ALBERT H. RIBEIRO and HENRY L. COOMS,

Intervenors-Appellants

On Appeal from the U.S. District Court for the
Southern District of New York

BRIEF OF AMICUS CURIAE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

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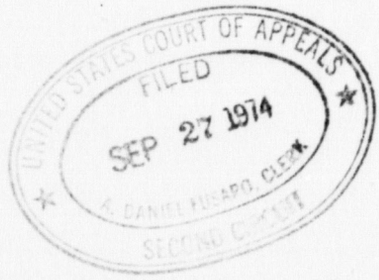

STATEMENT OF THE CASE

Plaintiffs-Appellees have brought this action under the Fifth and Fourteenth Amendments to the U.S. Constitution and under 42 U.S.C. Sec. 1981 and 1983 and their jurisdictional counterparts. This is a class action on behalf of 119 black and Hispanic Correction Officers who took a Civil Service examination for promotion to Correctional Sergeant, but who either failed the examination or passed too low to be appointed. There was no allegation of intentional discrimination; following the model set by the U.S. Supreme Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971) and by this court in Chance v. Board of Examiners, 458 F.2d 1167 (1972), the case merely involved a showing that the examination had a disparate pass/fail ratio for blacks and Hispanics as against whites, and was not proved by Defendants-Appellees to be job related (Appendix A-149).

The trial court issued an Opinion and Order finding for Plaintiffs on April 1, 1974 (A-148). An Order and Decree followed on July 31, 1974 (A-241). The Order and Decree, briefly, (1) enjoined any provisional or permanent appointments based on the examination in question, (2) ordered that a new validated non-discriminatory selection procedure be devised, (3) ordered the development of an interim selection procedure which should involve a hiring ratio of one black or Hispanic to three whites, and (4) ordered that even after the non-discriminatory validated selection procedure is promulgated, appointments will continue to be made on a ratio of one to three.

While the Anti-Defamation League has serious reservations about the appropriateness of imposing any form of hiring quota, this amicus curiae brief will address itself exclusively to the impropriety of item 4, the hiring quota remedy ordered after the establishment of a new validated non-discriminatory selection procedure.

CONSENT OF THE PARTIES

The parties and the intervenor have consented to the filing of this brief. A stipulation of consent is on file with this court.

INTEREST OF THE AMICUS

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed briefs as amicus in this court and the U.S. Supreme Court urging the unconstitutionality or illegality of various racially discriminatory laws and practices in such cases as, e.g., Shelley v. Kraemer, 334 U.S. 1, (1948); Sweatt v. Painter, 339 U.S. 629 (1950); Brown v. Board of Education, 347 U.S. 483 (1954); Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714 (1963); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) and De Funis v. Odegaard, _____U.S._____ (1974).

QUESTION PRESENTED

Is the imposition by the trial court of hiring ratios, after a valid non-discriminatory selection procedure has replaced the current procedure, an abuse of direction under the facts of this case?

ARGUMENT

POINT I

Under the facts of this case the trial court's order goes beyond any order previously upheld by this court, and should be stricken with respect to the hiring quotas imposed after the new selection procedure has been adopted.

This court has had before it four times the issue of preferential hiring quotas. See U.S. v. Wood, Wire, and Metal Lathers International Union, Local 46, 471 F.2d 408, Cert. den. 412 U.S. 939, (1973); Vulcan Society of New York City Fire Department, Inc. v. The Civil Service Commission, 490 F.2d 387, (1973); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F.2d 1333, (1973); Rios v. Steamfitters Local 638, _____F.2d _____, 8 FEP Cases 293 (June 1974). In all of these cases this court has upheld hiring quotas. However, all these cases are distinguishable from the instant case, and this court's approval of hiring quotas was not unequivocal.

In U.S. v. Lathers, intentional discrimination was charged against the Union, and patterns and practices of discrimination were continued even after the suit was filed and an affirmative action agreement had been reached. This court stated in Lathers, "While quotas merely to attain racial balance are forbidden" (emphasis added), "quotas to correct past discriminatory practices are not."

Furthermore, unlike Lathers, in which the work permits ordered to be issued were for jobs for which no apprenticeship was required, so that all applicants were expected to have interchangeable qualifications, the new validated selection procedures in the case at bar would develop a ranked list of

eligibles, so that under the quota system lesser qualified minority group members would be preferred over more highly qualified whites.

Again in Rios, past intentional discrimination continuing into the present was involved. This court upheld preferential hiring quotas under the circumstances there presented but said "Where a racial imbalance is unrelated to discrimination...no justification exists for ordering that preference be given to anyone on account of his race or for altering an existing hiring system or practice."

Even in the Rios case, which, unlike the instant case, involved intentional discrimination, Justice Hayes dissented on the issue of hiring quotas, setting forth possible proper remedies not involving quotas. He said "Judicial resort to racial classification is designed to make racism respectable. It gives legal sanction to the unfortunate attitudes which have resulted in the exclusion of minorities from the mainstream of the nation's economy."

Bridgeport Guardians and Vulcan Society involved, as in the case at bar, a disparate effect of a Civil Service examination upon minorities. In Vulcan this court upheld interim quotas only, pending the preparation of a validated non-discriminatory selection procedure. Moreover, in both cases, the quotas were approved "gingerly" and to cure the effects of past discrimination, whereas, here, the disparate effect of only a single test is involved. In Bridgeport Guardians, in justifying the use of hiring quotas, this court pointed out that the discriminatory test was "archaic" and had been in use many years, that "The failure to recognize increasing evidence that tests of this type have an innate cultural bias cannot be overlooked", and further that there had been almost "no positive steps to recruit minority personnel". In addition, this court struck a provision for hiring quotas on promotions on

the grounds that no justification appeared for such quotas, as discrimination in promotions was not involved.

The remedy of hiring quotas, here imposed by the trial court even after a non-discriminatory validated selection procedure has been devised, and where there is no aura of past discrimination involved, has no basis in precedent in this court and should be stricken as inappropriate.

POINT II

The preferential hiring ratios imposed after a valid non-discriminatory selection procedure has been devised, should be stricken as inappropriate in that they will violate the rights of non-preferred persons who are deemed more qualified under the new tests.

Defendants-Appellants have been directed by the trial court to devise new,non-discriminatory, job-related selection procedures. These procedures will of necessity result in a ranked eligible list (Article V, Section 6, New York State Constitution; Civil Service Law, Section 50; Rules and Regulations of the Department of Civil Service, Section 3.6). If preference in hiring is given on the basis of race to blacks and Hispanics who are ranked lower on the list then the others more qualified who are passed over, the constitutional rights of innocent parties will be violated.

There is a basic proposition, sometimes lost sight of, that the Equal Protection Clause of the Fourteenth Amendment prohibits state-sponsored or supported discrimination against all persons regardless of race.

The Supreme Court has struck down racial classifications in a variety of contexts. In McLaughlin v. Florida, 379 U.S. 184 (1964), Mr. Justice White describes such classification as "constitutionally suspect... subject to the most rigid scrutiny...and in most circumstances irrelevant to any constitutionally acceptable legislative purpose."

A quota in favor of non-whites involves classification on the basis of race.

See De Funis v. Odegaard, supra, in which the question of the constitutionality of "benign quotas" was presented. The case was mooted, but Justice Douglas, the only member of the Court to speak on the substantive issue, clearly stated his belief that selection procedures are constitutionally infirm unless "racially neutral." "The State . . . may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation, in order to satisfy our theory as to how society ought to be organized."

The result of the new selection procedures mandated by the court below will be that members of plaintiff class will have an equal opportunity to compete on merit and fitness for places on the eligible list. To superimpose preferential hiring upon this ranked list will result in an unconstitutional deprivation to those whites who are higher on the list but who are passed over for selection solely because of their race.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, (1971), a school segregation case, which has been widely cited as sanctioning racial consideration in fashioning a remedy, was not a case where any deprivation of which legal cognizance can be taken was imposed on anyone. No student and no teacher lost a place for racial reasons and if reassignment based on race was involved it impinged on no cognizable rights. Significantly in Swann, supra, under the heading "Racial Balances or Racial Quotas", Chief Justice Burger stated, "If we were to read the holding of the district court to require as a matter of substantive constitutional right any particular degree of racial balance or mixing that approach would be disapproved and we would be obliged to reverse."

Once a new valid selection procedure is developed in the case at bar, so that the disparate effect complained of has been eliminated, there is no rationale for excluding a white who ranks higher on the eligible list in favor of a lesser qualified minority group member. The wrong has already been remedied.

The trial court has additionally erred in not even restricting the ordered preference to members of the aggrieved class. In Castro v. Beecher, 459 F.2d 725 (1971), the First Circuit upheld an interim hiring procedure in which preference was ordered to be given those minority group members who had actually taken the previous discriminatory test and failed, but subsequently passed the new validated test. In this manner, only those individuals who had been discriminated against were eligible for a preference. However, the trial court in the instant case has accorded a preference to any black or Hispanic. In light of the fact that the disparate effect, as stated above, was not intentional, the deprivation of job opportunities which would be suffered by innocent third parties (those whites who rank higher on the new eligible list) cannot be justified.

Therefore so much of the trial court's order as continued hiring quotas even after new job related selection procedures have been adopted should be stricken as violative of the rights of more qualified whites who would be passed over.

POINT III

That part of the order which imposes preferential hiring quotas even after a new valid non-discriminatory selection procedure is adopted should be stricken because the remedy proposed exceeds the scope of the wrong complained of.

The U.S. Supreme Court in the recent case of Milliken v. Bradley (42 U.S. Law Week 5249, July 25, 1974), a school secregation case, clearly set forth the principles that should underline the remedial process. Citing Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971), the Court said, "The task is to correct by a balancing of the individual and collective interests the condition that offends the Constitution". A federal remedial power may be exercised "only on the basis of a constitutional violation" and "as with an equity case the nature of the violation determines the scope of the remedy". (emphasis added)

The Court in Milliken addressed itself to the circumstances in which a federal court may order inter-district relief to remedy segregation found to exist in only one district. Although there was a finding of de jure segregation within the City of Detroit, and although the trial court had ruled that such segregation could not effectively be eliminated without resort to an inter-district remedy, the U.S. Supreme Court struck the trial court's order of cross-busing between districts. Chief Justice Burger, writing for the majority, stated, "The controlling principle, consistently expounded in our holdings, is that the scope of the remedy is determined by the nature and extent of the constitutional violation...an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts cause racial segregation in an adjacent district or where district lines had been deliberately drawn on the basis of race... Conversely, without inter-

district effect, there is no constitutional wrong calling for any inter-district remedy".

The amicus submits that the Supreme Court in Milliken and Swann has clearly indicated the principles by which remedies should be devised. There are many gradations of wrong in racial discrimination cases. And by the same token there is a great variety of possible relief. (See e.g. Rios, supra, Justice Hayes' dissent.)

The Supreme Court has stated that the remedy must not be outside the scope of the wrong. In the case at bar the trial court has correctly ordered that a new validated non-discriminatory test be prepared, and further has ordered interim relief. The amicus submits that the very drastic additional remedy of hiring quotas superimposed upon the new, color-blind, validated selection procedure has no justification here. There is involved neither past nor present intentional discrimination, nor any inference of any such previous action by Defendants-Appellants. There is only the disparate effect of one Civil Service examination, adopted in good faith by Defandants-Appellants, but declared after trial not to be job related.

That part of the order that imposes preferential hiring quotas even after the new procedures are devised should be stricken as inappropriate because it is beyond the scope of the wrong.

CONCLUSION

The amicus submits that so much of the order of the trial court as mandates continuation of hiring quotas after the new selection procedures have been adopted should be stricken by this Court as an inappropriate remedy on the facts of this case.

Respectfully submitted,

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TABLE OF AUTHORITIES

STATUTES